

This is an edited version of the Native Title Update 4/7/2003 Ngarluma Yindjibarndi -- Federal Court decision published by Blake Dawson Waldron on the website <http://www.bdw.com.au>, authored by Geoff Gishubl, Partner.

Daniel v Western Australia

On July 3 2003 Justice Nicholson of the Federal Court handed down his decision in *Daniel v State of Western Australia* [2003] FCA 666 (Ngarluma Yindjibarndi), this being the first native title determination application decision since the High Court's rulings in *Ward* or *Yorta Yorta*.

The area claimed by the Ngarluma and Yindjibarndi peoples in the Pilbara region includes the Port of Dampier and the Burrup Peninsula. The decision has significant implications for substantial mining, pastoral, transport, and future development interests.

The decision also determined the overlapping claims of three other groups (the Wong-Goo-TT-OO people, the Yaburara Mardudhunera people and the Kariyarra people).

Some of the key findings in regards to connection are that:

- The Ngarluma people hold non-exclusive rights and interests to (broadly) the lowlands and the Yindjibarndi to the tablelands within the claimed area.
- There is no native title in the Burrup Peninsula or the islands in the determination area.
- There is no native title in the sea beyond the low water mark.
- The three overlapping claimant groups held no native title rights in the determination area (save that the Wong-Goo-TT-OO may do so as Ngarluma or Yindjibarndi people).

The rights of the Ngarluma and Yindjibarndi peoples include the rights to access and remain, engage in ritual and ceremony, take and use drinking water and care for sites and objects of significance. In certain areas the rights extend to the right to camp, hunt and forage, fish, gather bush medicine

and food, take flora and fauna, gather ochre, and light fires for cooking.

The key findings in regards to extinguishment largely follow the High Court's decision in *Ward*. Some of the findings include that:

- Mining leases granted under the *Mining Act 1978* do not wholly extinguish native title.
- His Honour found that the grant of a mining tenement extinguished rights such as a right to live on the land. Other rights, such as the right to enter, survive.
- The vesting of certain areas of seabed under the *Marine and Harbours Act 1981* wholly extinguish native title.
- Certain reserves in the claim area wholly extinguish native title.
- His Honour did not make findings on the native title rights and interests that survive the grant of a pastoral lease. However, his Honour considers that more can coexist than with say, a mining lease.

What are the implications of these findings?

Once a native title determination has been made, (after additional submissions from the parties) there will be certainty within the area in relation to:

- 1) the application of the right to negotiate;
- 2) the native title rights and interests that will be the subject of the right to negotiate and other future act procedures;
- 3) the identity of the native title holders with whom developers must deal.

The Ngarluma and Yindjibarndi People's native title rights may in reality be limited in many parts of the determination area because of the extinguishing effects of other interests. Consequently, managing co-existence on the ground, Aboriginal heritage and securing non-native title outcomes are likely to assume greater importance for stakeholders in the determination area.